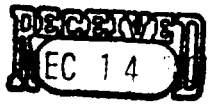
SFUND-2001-0009-0142

LATHROP GAGE



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December 13, 2001

VIA FACSIMILE AND
UNITED STATES MAIL

CERCLA Docket
U.S. Environmental Protection Agency
1235 Jefferson Davis Highway
First Floor
Arlington, VA 22201

Re: *Comments of BFI Waste Systems of North America, Inc. on proposal to list "Sauget Area 2" on the CERCLA National Priorities List*

Dear Docket Coordinator:

BFI Waste Systems of North America, Inc. ("BFI") opposes the September 13, 2001, United States Environmental Protection Agency ("USEPA") proposal to list "Sauget Area 2", which actually includes five separate sites, as a single site on USEPA's National Priorities List ("NPL"). In summary, the Hazard Ranking System Documentation Record ("DR") unlawfully and arbitrarily aggregates and scores five separate sites as a single site.

In its Site Description, USEPA claims that Sauget Area 2 "consists of five sources": Areas 0, P, Q, R and S. The Site Descriptions then provided by USEPA of these different "sources" illustrate that they are mostly noncontiguous areas, with uncommon ownership and operation histories, which should not be aggregated:

- Source O, which is not contiguous to any of the other four sites, allegedly consists of four inactive sludge dewatering lagoons associated with the Village of Monsanto/Sauget Waste Water Treatment Plant. There is no claim that source O was ever a landfill.

- Source P, also not contiguous to any of the other four sites, was a landfill, but only permitted to receive non-chemical waste from Monsanto and diatomaceous earth filter cake from Edwin Cooper.

- Source Q is alleged to be an inactive waste landfill which operated for seven years and received waste from many PRPs.

- Source R is alleged to have received waste only from Monsanto. It also is alleged by USEPA to have been in operation both prior to and after source Q operated.

- Source S, also not contiguous any of the other four sites, allegedly was used for drum disposal by unidentified parties.

In 1983, USEPA adopted an Aggregation Policy, setting forth various factors to be used in determining whether to combine separate parcels as one NPL site. *See* 48 Fed. Reg. 40,658, 40,663/3-64/1 (Sept. 8, 1983). That policy called for the listing of noncontiguous facilities on the basis of such factors as whether the areas were part of the same operation, whether the potentially responsible parties are the same or similar, whether the target population is the same or overlapping and the distance between non-contiguous areas. (48 Fed. Reg. at 40,663/3; *See also* 49 Fed. Reg. 37,070, 37,076/1-2 (Sept. 21, 1984). As shown above, even USEPA's own Aggregation Policy would not allow for these distinct "sources" to be listed as one site. In 1996, however, USEPA's Aggregation Policy was expressly invalidated. *Mead Corp. v. Browner, 100 F.3d 152 (D.C. Cir. 1996).*

In *Mead*, the United States Court of Appeals for the District of Columbia Circuit ruled that USEPA could not lawfully use its Aggregation Policy to list noncontiguous facilities as a single site on the NPL when the listing could not be individually justified based on statutory risk-based factors. Those factors are specifically listed in CERCLA Section 105(a)(8)(A), as follows:

> The population at risk, the hazard potential, . . ., the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, the damage to natural resources which may affect the human food chain . . ., the contamination or potential contamination of the ambient air . . ., State preparedness to assume State costs and responsibilities, and other appropriate factors.

100 F.3d at 156 (quoting 42 U.S.C. § 9605(a)(8)(A)).

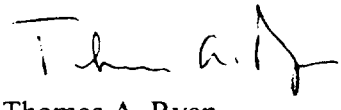
The *Mead* Court noted that CERCLA directs USEPA to base listing criteria on "relative risk or danger to public health or welfare or the environment." *Id.* (quoting 42 U.S.C. § 9605(a)(8)(A)). "Permitting the inclusion of low-risk sites on the NPL," the Court stated, "would thwart rather than advance Congress's purpose of creating a priority list based on evidence of high risk levels." *Id.* at 156. The Court further stated that "(t)he

idea that Congress implicitly allowed USEPA broad discretion to lump low-risk sites together with high-risk sites, and thereby transform the one into the other, is anything but reasonable." *Id.* The Court concluded that CERCLA Section 105(a)(8)(A) does not permit USEPA to use Aggregation Policy criteria such as common ownership and operations to justify listing noncontiguous sites on the NPL, since such criteria "bear only the dimmest relation to any idea of risk." *Id.* at 153.

USEPA has provided no justification for aggregating five mostly noncontiguous sites, with varying ownership and operation histories, to form "Sauget Area 2". BFI, therefore, requests that USEPA calculate the HRS score for each of the five sites, and withdraw its proposal to list the five sites as one improperly aggregated site known as Sauget Area 2.

Yours very truly,

LATHROP & GAGE L.C.

By: 

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TAR/df
cc: Mr. Steve Doss